Case No. 84-1583

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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CASC Nos. 84-1113 & 84-1748

DC No. 83-0454

WALBER CONSTRUCTION CO.,

Appellant,

V.

THE UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
SAMUEL PIERCE, Secretary,

Appellee.

JURISDICTIONAL STATEMENT

By: Pauline Walber D/B/A
Walber Construction Co.
Appellant,
3530 West Outer Drive
Detroit, Michigan 48221
Phone: 313-864-6076 or
313-537-7800

Dated: February 26, 1985

STATEMENT OF ISSUES PRESENTED

1. Whether the Trial Judge erred with his Decision that the Law prohibits Sex Discrimination by Federal Government Contractors on the basis of sex and does not proscribe such Discrimination by the Federal Contracting Authorities against Contractors.

2. Whether the Trial Judge erred with his Decision that Appellant's Claims against the Department of Housing and Urban Development, are Claims against the United States under 28 U.S.C. 1346 (a)(2).

3. Whether the Trial Judge erred in Ordering Appellant to waive amounts in excess of $10,000, with each of 3 Contracts, based on Sex Discrimination, in order to be within the Jurisdiction of the United States District Court.

4. Whether the Trial Judge erred with his Order to transfer Claims with Contract 044-78-4679 (Lakewood) to the U. S. Claims Court, during pendency of the Appeal from his Decisions, filed in the U. S. Court of Appeals for the Sixth Circuit.

5. Whether the Trial Judge erred with his Order Denying Plaintiff's Motions to Temporarily Set Aside Claims Regarding Lakewood Contract and Motion to

EDITOR'S NOTE

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Amend Order Subject Matter Jurisdiction and Transferring Action with Regard to Lakewood Contract To United States Claims Court.

6. Whether the Trial Judge erred with his Order Denying Plaintiff's Motion to Stay Proceedings for Enforcing Order to Transfer Action to United States Claims Court.

7. Whether the Trial Judge erred in construing Appellants Motion to Amend Order Subject Matter Jurisdiction to be a Motion for Reconsideration, thereby, considering said Motion to be untimely.

8. Whether the U. S. Claims Court erred in Denying Plaintiff's Motion to Stay Proceedings pending the Appeal, thereby depriving Appellant the Right to waive amounts in excess of $10,000, in order to be within the Jurisdiction of the District Court, as Ordered by the Trial Judge.

9. Whether the U. S. Claims Court erred in Dismissing the matter before the Court, that was prematurely transferred to said Court, even though it was a Dismissal without prejudice.

10. Whether Claims against the Government involving Sex Discrimination are Claims under 28 U.S.C. 1346 (a)(2).

11. Whether Claims against the Department of Housing and Urban Development are Claims against the United States under 28 U.S.C. 1346 (a)(2).

12. Whether Claims involving Sex Discrimination are Claims outside the scope of a Government Construction Contract.

13. Whether Claims involving Sex Discrimination are Claims under CDA.

14. Whether the U. S. District Court has Jurisdiction on Claims against the Department of Housing and Urban Development, after Administrative relief has been exhausted.

15. Whether a final Decision and/or Order, regardless if entered by a Contracting Officer, an Administrative Board, including all Federal Courts, shall inform the moving party of his (her) Right to pursue the matter further, indicating time limit and proper Court Procedure to do so.

16. Whether it justifies to burden Appellant with having to Respond, a second time, in the Court of Appeals for the Federal Circuit, to Government's Motion to Dismiss, originally filed in the Court of Appeals for the Sixth Circuit.

17. Whether the United States Department of Justice

has a Right to defend the Government, against the very same Prohibited Law, that it is supposed to protect the Public against, in this matter Sex Discrimination.

18. Whether U. S. Courts of Appeals have Jurisdiction on Appeals from Interlocutory Orders, under 28 U.S.C. 1292 (a)(1).

19. Whether the fact that the Claims Court entered a Judgment Dismissing Complaint without Prejudice, supports that the Decision entered in the District Court, that this Appeal is based upon, is a final Judgment, not an Appeal from an Interlocutory Order.

20. Whether the Sixth Circuit erred with its spontaneous Decision indicating that the action in the District Court was based in part on 28 U.S.C. 1346, for the purpose to provide grounds for transferring Appeal to the CAFC.

21. Whether the Sixth Circuit erred with its Order indicating that the action in the District Court is based on 28 U.S.D. 1346, without entering an Opinion and/or having an audio recording made to support the grounds that said Order is based upon.

22. Whether the Sixth Circuit erred by failing to dispose of Appellant's Motion to Stay Order by

District Court - Pending Appeal, received October 26, 1984, prior to entering its Order, November 16, 1984, to transfer Appeal to the CAFC.

23. Whether the Sixth Circuit erred in transferring the Appeal to the CAFC, on an issue that was before the Court, that the Appeal is based upon, that it already had decided.

24. Whether the Sixth Circuit erred in transferring the Appeal to the Federal Circuit, prior to the expiration of the 10 days, as provided with FRCP Rule 62.(a).

LIST OF PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WALBER CONSTRUCTION CO.,

Appellant,

V.

THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
SAMUEL PIERCE, Secretary

Appellee.

Pauline Walber D/B/A
Walber Construction Co.
Appellant,
In Pro Per

George M. Beasley, III
Commercial Litigation Branch
Civil Division
United States Department of Justice
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JURISDICTIONAL STATEMENT

REFERENCE TO THE DECISION BY THE HUD BOARD OF CONTRACT APPEALS (HUDBCA)

I. Nature of the Case

This is a Claim based on Sex Discrimination involved with four (4) Contracts to Rehabilitate property for the U. S. Department of Housing and Urban Development, Office located in the City of Detroit, State of Michigan, which were completed, approved and accepted by HUD.

During the performance of these Contracts, as Disputes originated which clearly indicated Sex Discrimination, Appellant was instructed by Contracting Officer, that she must proceed with performance of Contract to completion, pending a Decision on an Appeal, otherwise he would rule Appellant to be in Default and her Surety Bonding will be attacked.

In addition, the threat of Terminating the Contract, always existed.

These Claims were originally in slow process before the HUDBCA.

It was HUD not Appellant that made the choice for these Claims to be processed by the HUDBCA.

After being with the Board for almost four (4) years, the Hon. Edward Terhune Miller, an Administrative Judge, without affording Appellant a Hearing, Dismissed all four (4) Appeals by Lack of Jurisdiction, which in no way can be applied to these Claims, on the basis used for Dismissal.

By this action, Appellant had exhausted all reasonable Administrative relief available to her, which based on Sex Discrimination, never should have been assigned to the HUDBCA, to begin with.

A Claim based on Discrimination is outside the scope of a Government Construction Contract, therefore, it is not subject to equitable adjustment under the Contract nor to Administrative Review or Resolution.

During 1978 and 1979 the Department of Housing and Urban Development had a Program known as T.B.R. (To be Repaired), whereby property was sold first, than Contract for Repairs was put out for Bidding.

During this period, Appellant was the successful Bidder and was awarded twenty seven (27) Contracts, which, excluding Amendments, came to a total of $302,907. Out of these, Claims for twenty three (23) Contcacts, were under Appeal with the HUDBCA.

These Claims involved thirteen (13) Terminated Contracts, some with work well in progress and ten (10) completed Contraccs. The 13 Terminated Contracts excluding Amendments, came to a total of $166,126, more than 50% of all Contracts awarded, Claims with seven (7) of the Terminated Contracts are in the U. S. District Court, under Action No. 83-CV-0348-DT, and, the four (4) Contracts listed with this Complaint, are among the ten (10) completed Contracts.

It is well indicated that all Terminated Contracts, were Terminated based on Sex Discrimination.

Based on the fact that Appellant, the only Female on the Program, was the only Contract with as great a number of Terminated Contracts, not at all for the benefit of the Government, at a time when HUD was backlogged with work and, all Contractors were saturated with more work than they could possibly handle to meet HUD time limits for completion dates, among other reasons, it well supports Appellant's contention that the Termination of all Contracts, involved Sex Discrimination.

The following is a breakdown of the amounts Claimed with each Contract at issue with this Complaint:

Contract No. & Name	Amount Claimed
044-78-4595 (Meyers)	$ 8,749.68
044-78-4679 (Lakewood)	25,108.61
044-78-4980 (Longacre)	11,763.10
044-78-4694 (Sussex)	15,144.87
Total amount Claimed with Complaint:	$ 60,766.26

The HUDBCA, after almost four (4) years, suddenly decided to Claim that it had Jurisdiction only on issues that a Contracting Officer (C/O) refers to with his Final Decision.

Response letters by a C/O are not considered a Final Decision, but, to serve its purpose, the HUDBCA conveniently, selected Response Letters, which it chose to consider as a Final Decision by the C/O.

With said letters the C/O refers only to the $50.00 charged for each Inspection of Property and the 5% of total Contract, that he decided to withhold, as a condition to accept completed Contracts for payment.

Based on a Decision entered by the HUDBCA on other Appeals, whereby the Board ruled that HUD was not entitled to the $50.00 for each Inspection Fee, Appellant was refunded all moneys charged for Inspection Fees, plus Interest.

In addition, in 1979, at a Hearing before the Hon. B. Paul Cotter Jr., Administrative Judge and

Chairman of the Board, the Court also Determined that HUD was not entitled to the withhold of 5% from the total amount of each Contract, and, to avoid exposing the Government to payment of Interest, instructed HUD to process for payment, all Completed Contracts, without the 5% withhold, which at that point, came to a total of $173,303.59.

During the years that these Claims were with the HUDBCA, all Rules of Procedure for Boards of Contract Appeals were completely ignored by HUD and the Board allowed it to happen, repeatedly claiming that the Government is entitled to Latitude.

There is a considerable difference between LATITUDE and PARTIALITY, that the Board refused to recognize, whereby procedural errors by the Board were also commited, and, even if the Board, in response to numerous Motions by Appellant, would rule in her favor, whereby an Order to that affect would be entered, same was completely ignored by the Government.

As a result of this, including the time that this Complaint has been in the U.S. District Court, as of this date, Appellant has been on route seeking relief, for almost six (6) years.

Based on the fact that payment was made on the

Contracts at issue herewith, without Interest for all time that Contracts were completed, that the C/O refused to accept for payment, without the 5% withhold, and the $50.00 charged for Inspection Fees, was refunded in 1982, with Interest, these Claims, after being with the Board for almost four (4) years, it Decided to consider as Moot, and Dismissed the Appeals by Lack of Jurisdiction.

An official Order to that affect was never entered by the Board, however, the Record File well supported that the claims at issue herewith were before the C/O, for which he failed to enter a Final Decision, but;

Pursuant to Rules of Procedure for Boards of Contract Appeals, Rule 1.(a)(b), all claims under $50,000 each, shall be considered by the Board, even with the failure of the C/O to issue a Final Decision.

Having exhausted the Administrative Relief available, due to the fact that Claims are totally based on the abuse and Sex Discrimination that Appellant was burdened with by HUD, a Government Agency, a Complaint was filed in the U. S. District Court, Eastern District of Michigan, Southern Division.

II. The Government failed to inform Appellant of her Rights.

The Contract Disputes Act of 1978 (Public Law 95-563) (CDA) provides that a Contractor has the Right to Appeal a Contracting Officer's Decision to a Board of Contract Appeals, within 90 days from the date of receipt of such Decision or alternatively to sue in the U. S. Claims Court, within one year from the date of the Decision.

This the C/O failed to inform Appellant.

Appellant's Claims with these four (4) Contracts are based on Sex Discrimination, as such, they were not subject to Administrative Review or Resolution.

This the C/O failed to inform Appellant.

Pursuant to CFR 1-12.805-10, Disputed matters related to equal opportunity are not to be handled under the Dispute Clauses.

This the Government failed to inform Appellant.

As a total, the HUDBCA lacked Jurisdiction on these Claims, to begin with, and, they are irrelevant to CDA, which could very well provide the Government with Legal Grounds to get said Claims Dismissed in the U. S. Claims Court.

This was obviously the main reason

for the purpose to transfer these Claims to the U. S. Claims Court, but;

Since the Board accepted Appellant's Claims under the Dispute Clause, accordingly, it had an obligation to inform Appellant of her Right under CDA.

This the Government failed to do, (see Complaint #1, pages 3-5).

By this action the Government was hitting Appellant with both ends of the stick.

In addition, what the Board considered to be a Final C/O's Decision, with each Contract, were just letters in Response to the Dispute over Inspection Fees and the 5% of total Contract that he demanded to withhold as a condition to accept these Contracts for payment, after Contracts were completed, (see Apl. F. A-Exh. #1, page 2).

A Contracting Officer's Response letter is not an Appealable Decision under CDA, this could also provide the Government with a Legal Crutch, to get these Claims Dismissed in the U. S. Claims Court, under CDA.

A Claim based on Discrimination is a Question of Law, not a Question of fact, accordingly Appellant had the Right to sue in the District Court, to begin

with in 1979, without having to first exhaust Administrative Relief.

These are not Claims based on Contract Disputes, they are based on the abuse and Sex Discrimination that the Government burdened Appellant with.

III. Incomplete and Inadequate Specifications Provided by the Government

As a General Rule of public Contract Law, the Government has a duty to prepare clear, complete and accurate specifications and drawings.

Specifications provided by the Government are a warranty of what a Contractor is obligated to perform under the Contract.

This HUD fails to do, to support this see Complaint #1 page 2, for amounts increased to Contracts, via Amendments to Contracts.

To use as an example: The Lakewood Contract in the amount of $14,892, due to inadequate specs, by Amendments to Contract, same was increased by $13,845.80.

The Sussex Contract was in the amount of $9,983, due to inadequate specs, by Amendment to Contract, same was increased with an additional $6,925.30.

Although Brothers Specifications Inc., the

Managing Agent for HUD is well capable to prepare adequate specs, for some strange reason, HUD continuous to accept inadequate specs and prefers to handle the additional work, via Amendments to Contract, whereby, after the Bids are entered, at the time the Contract is awarded, the successful Bidder is instructed to prepare the Initial Amendment in time for a Walk-through (W/T) on property, and, at which point the HUD representative determines the amount allowed, for each Item to be performed via Amendments, (see Apl.F. A-Exh. #2, Contract award for Lakewood).

This Document supports that the Government does not wish to be informed, prior to Bidding, of any changes, additions and deletions to the original specspecifications, this supports that HUD preferred to note changes, additions and delitions to specifications at the W/T, which takes place after Contract has been awarded.

For that reason, it was not Appellant's duty to notify HUD that specs were inadequate, they always knew it, to begin with.

Appellant's constant argument was: If HUD wished to Rehabilitate Government acquired properties, for the most, via Amendments to Contracts, so be it, but;

Amendments to Contract, are not Items that Appellant Bid on, therefore, pursuant to Executive Order o. 11246 as Amended by Executive Order No. 11375, dministered by the Office of Federal Contract Compiance, which requires pay equity, equal pay for work f comparable value or worth and pursuant to Title II of the Civil Rights Act of 1964, Administered by he Equal Employment Commission, Appellant was entitled to equal pay as allowed a Male Contractor, er Item.

Government's Failure to do so, violated Appellant's Constitutional Rights.

Equal Employment Opportunity is the Law, Sex iscrimination is Prohibited.

For the seven (7) years that Appellant participated with Programs at HUD, Sex Discrimination, in ore ways than one, was a constant, repeated argument, ften braught to authorities within the Agency, which as always swept under the carpet.

IV. Sex Discrimination involved with the Lakewood Contract

This Contract had a total of eight (8) Amendents to Contract, for additional work that was omited from specs, as approved by HUD, that was essential

to perform, to pass Inspection by the Building Department in the City of Detroit.

The following is a Description of said Amendmements.

Amend. No.	Items Involved	Amount allowed for overhead & profit	Total amount of Amend.
1	28	13%	$ 2,520.80
2	9	15%	3,500.00
3	14	- 0 -	1,638.00
4	11	- 0 -	1,525.00
5	10	- 0 -	3,472.00
6	9	- 0 -	870.00
7	7	- 0 -	155.00
8	2	- 0 -	165.00
Total	90		$ 13,845.80

Specifications for a Contract that need an additional ninety (90) Items to be Amended to Contract, can not be considered adequate specs provided by the Government with this Contract.

Brothers Inc. provided the Specifications for HUD.

Government Witnesses from Brothers Inc., at Hearings on other Contracts, before the HUDBCA, testified that based on their calculation, on Amendments a Contractor should be allowed 18% above cost, for overhead and profit, (see Apl.F. A-Exh. #3).

At the beginning HUD did allow Appellant a small percentage for overhead, none for profit, thereby, on Amendment No. 1, Appellant averaged to what HUD considered 13% above cost and on Amendment No. 2 15%,

on the remaining six (6) Amendments, Appellant was completely Denied overhead and profit.

Accordingly, the amount Claimed by Appellant for overhead and profit on Amendments, in Plaintiff's Response and Brief to Government's Motion for more Definite Statement, (see DC file #4, Page 3), can not be considered involving a Contract Dispute, this is definitely a Claim based on Sex Discrimination.

To begin with, all of Appellant's Claims involving Amendments to Contract, can not be considered as Contract Disputes, since they were not included with the Contract.

To further prove that on many Items covered by Amendments, Appellant was not allowed an amount of equal pay for equal worth as a Male Contractor, at times it would even be below cost, but, at the same time, HUD demanded that Appellant pay her Employees and/or Subcontractors, in accordance with the U. S. Department of Labor Wage and Hour Division.

Appellant argues that if her Employees and/or Subcontractors shall not be Discriminated, neither shall the Government Discriminate her.

To use as an example Amendment No. 1, (see Apl. F. A-Exh. #4).

Item No. 8: "Install solid core Entrance door, garage".

Brothers Inc. Provide HUD with a Cost Price List to keep the Construction Analyst informed of the going price per Item.

This is a Standard Item, Appellant knew that the men were getting a minimum of $175 and up, per door, for said Item 8, Appellant also requested $175.

Cost Price List, page 15, Item 818-02, (see Apl. P. A-Exh. #5), indicates the cost to Install the Door in itself, to be $106.61.

Cost Price List, Page 14 Item 811-01, (see Apl. P. A-Exh. #6) indicates the cost to install the entrance lockset hardware, to be $30.71.

On a Garage Door a "Peep Sight" is of no value.

For the 4" x 4" Glass, installed at the Lumber Co., the charge is $15, added on to the cost of the Door.

This makes the cost only, for the Installation of the door, a total of $152.32, add to this the 18% for overhead and profit, even at the Government's calculation, which comes to $27,42, the total amount that Appellant should have been allowed is a total of $179.74, which is in line with the amount allowed a

Male Contractor, for the Installation of same Door, and, is even $4.74 more than Appellant Requested.

The $145 that Appellant under pressure, was forced to accept, comes to $7.32 below to what Brothers Inc., calculated the cost only to be.

Also see Item 11 on same Amendment, "Replace City Sidewalk, including special permit, 90 sq. ft."

Appellant requested $315, Government allowed only $209.

Cost Price List, Page 6, Item 506, (see Apl. F. A-Exh. #7), indicates the cost to replace concrete to be $2.37 sq. ft., whereby the total cost for the concrete only, would be $213.30, add to this 18% for overhead and profit, $38.39, this comes to a total of $251.69.

In accordance with Contract, all Permits are to be paid for by Contractor, but, when additional work is necessary, involving an Amendment that requires an additional and/or different Permit, for a Male Contractor, HUD allowed the cost for Permit, which makes common sense, since it was not included with Contractor's Bid, at the time Bid was entered.

For Appellant, as indicated herewith, the $209 allowed her on this Item, was $4.30 less than the

cost for the concrete only, as calculated by Brothers Inc., it did not include overhead and profit and Appellant was not allowed the cost for a City Sidewalk Permit, which at that time was $90, regardless as to how much of the Sidewalk, is to be replaced.

All these, can not be considered as Contract Disputes, this was pure abuse and Sex Discrimination.

There are numerous reasons why Appellant was forced to accept this abuse and Sex Discrimination:

(a) The threat of Terminating the Contract, if Appellant refused to accept amounts allowed by HUD, involving Amendments, was always there.

(b) Of the thirteen (13) Contracts Terminated by HUD, due to Amendments, the loss on Contracts with work in progress, involving the amounts paid by HUD for work completed prior to Termination, was by far greater than the loss on Amendments.

A good example of this is the Edison Contract, presently pending a Decision by the HUDBCA, on the Hearing that was held November 2-4, 1982. For work completed prior to Termination, Appellant billed the Government a total of $23,107.28, against this the Government paid, $14,493.00, a difference of $8,614.28.

Total amount of Contract, including Amendments, came to $36,327.00.

When this Contract was first put out for Bidding,

the work involved was to difficult, Appellant's Bid was the only Bid entered.

Contract was Terminated due to failure to agree on amounts allowed for an Amendment, whereby Appellant was unable to accept same, for the amounts offered by the Government.

After Contract was Terminated, based on the fact that Appellant had completed more than half of the work required, which included the roughing, the most difficult work needed, when Contract was put back out for Bidding, a total of seven (7) Contractors entered Bids on this Contract, and, new Contract was awarded to a Male Contractor that was also awarded other Contracts that were Terminated for Appellant, at a cost to the Government by far greater than it would have cost the Government to allow Appellant the adjustment requested and allow her to complete the Contract.

This was the Heart of Termination of Contracts for Appellant, after the most difficult performance had been completed, to award said Contract to a Male Contractor of HUD's choice, regardless of the additional cost to the Government.

This was also a repeat performance by HUD with the Field Contract, later awarded to same Male Contractor as the Edison Contract.

To further prove the untruthfulness by the Government, where Appellant was concerned, to defend he abuse that she was burdened with;

With Government Witnesses the Right hand never new what the Left hand was doing:

With Apl. F. A-Exh. #3, James Sullivan, President f Brothers Inc., a frequent Government Witness at earings before the HUDBCA, indicates that for General Contracting they calculate 23-28% for overhead nd profit, which no Contractor could live by, considering that for W/C Insurance only, the cost was pproximately, as an average, in the area of 10%, and or Amendments they calculated 18% for overhead and rofit.

Ced Crossley, Office Manager of Brothers Inc., ho was never called upon as a Government Witness, naware of the percentage Claimed by another employee with same Agency, indicates that the amount calulated for overhead and profit, for General Contracing to be 36%, this is a more realestic figure, see Apl. F. A-Exh. #8), but;

To make matters worse, with the Edison ontract, for work completed prior to Termination of ontract, covered by Contract, HUD allowed only 20% or overhead and profit.

The Performance and Payment Bond issued shortly after Authorization to commence work was issued for the Lakewood Contract, gave the Government a continuous threat, to attack Appellant's Bonding Co., if she failed to continue with the Performanc of Contract, which could not have been done in proper order, without the Amended Items, which although same could have been performed by separate Contract, with another Contractor, whereby the Government would have had to pay the true value for performing such Items, including proper overhead and profit, Government refused to do so, thereby, Appellant was forced to perform until completion of Contract, as demanded by the C/O, pending an Appeal after Contract was completed.

Based on the fact that the HUDBCA Dismissed these Appeals by Lack of Jurisdiction, and, Claims are based on Sex Discrimination, a Complaint was filed in the U. S. District Court.

COURSE OF PROCEEDINGS IN THE UNITED STATES DISTRICT COURT

The Complaint was filed February 8, 1983.

After extensive proceedings by Appellant, involving Discovery, not yet obtained, which can well be calculated will lead to admissible evidence for

Appellant to carry the burden of proof, that all of Claims are based on the abuse and Sex Discrimination that the Government so unjustly burdened her with, the Trial Judge decided on a different route, Subject Matter Jurisdiction.

November 16, 1983, this is more than nine (9) months later, the Honorable James P. Churchill, United States District Court Judge, entered "ORDER TO SHOW CAUSE", (see DC #23), whereby he states:

> "IT IS ORDERED that the parties appear on Thursday December 15, 1983, at 2 o'clock in the afternoon and show cause why some or all of the plaintiff's claims are without the Court's subject matter jurisdiction.
>
> IT IS FURTHER ORDERED that both parties file written briefs on the question on or before December 7, 1983, which shall address their contentions concerning subject matter jurisdiction and specifically the following issues:
>
> (1) Whether the claims against the Department of Housing and Urban Development are claims "against the United States" under 28 U.S.C. 1346 (a)(2)."

Accordingly, December 5, 1983, Appellant filed "PLAINTIFF'S BRIEF SUBJECT MATTER JURISDICTION, (see DC #29)

The Government's Brief, "DEFENDANT'S BRIEF CONCERNING SUBJECT MATTER JURISDICTION", although it indicates to have been served December 7, 1983, was

received by Appellant December 13, 1983, only two (2) days prior to the scheduled Hearing.

Following Appellant's Motion, "PLAINTIFF'S MOTION TO ADJOURN" (see DC #33), filed December 14, 1983, the Trial Judge entered an "ORDER GRANTING PLAINTIFF'S MOTION TO ADJOURN HEARING ON ORDER TO SHOW CAUSE & FOR FURTHER PROCEEDINGS", thereby, the Hearing was Adjourned to January 5, 1984.

This allowed Appellant the opportunity to file a Reply Brief.

December 27, 1983, Appellant filed "PLAINTIFF'S REPLY BRIEF TO DEFENDANT'S BRIEF CONCERNING SUBJECT MATTER JURISDICTION", (see DC #38).

At the Hearing, the Court at first states: T.2 (1-5-84)

> "There is no question today the question is the Court's jurisdiction. I'm not concerned with the merits of the case I'm interested in whether or not this is the right court to adjudicate the issue."

Later the Court raised a new and entirely different issue, not included with the previous Order, nor by the Government with its Brief; Whether the Prime Contractor (Appellant) can Claim damages involving Sex Discrimination, pertaining to Government Construction Contracts, T.19-23 (1-5-84).

January 9, 1984, only four (4) days later the Hon. James P. Churchill entere the "ORDER CONCERNING ORDER TO SHOW CAUSE AND DIRECTING PLAINTIFF TO ELECT TO WAIVE CONTRACT DAMAGE CLAIMS ABOVE $10,000 ON THE THREE CONTRACTS OTHERWISE OUTSIDE THE COURT'S JURISDICTION ON OR BEFORE FEBRUARY 1, 1984" (see Appx-H).

Said ORDER indicates that the Court considers Claims against HUD, without considering the fact that Appellant's Claims are based on Sex Discrimination, are Claims under 28 U.S.C. 1346 (a)(2).

Said Order states:

"IT IS ORDERED that the Court's jurisdiction over the plaintiff's claim upon contract #044-78-4595 (Myers) is noted asproper under 28 U.S.C. 1346 (a)(2). Plaintiff's claims under the other three contracts are deemed to be out side the Court's subject matter jurisdiction inasmuch as they are claims inexcess of $10,000 and within the exclusive jurisdiction of the United States Claims Court, PROVIDED HOWEVER,

IT IS FURTHER ORDERED that the plaintiff may elect to waive any such claims in excess of $10,000 under each of the three contracts. If plaintiff wishes to make such an election, she shall file, on or before February 6, 1984, a plain and simple statement that any damages in excess of $10,000 under each of the three contracts are voluntarily and knowingly waived. Such statement shall be deemed to be an amendment to the complaint with regard to the prayer for relief.

IT IS FURTHER ORDERED that if no such election is timely filed, the action will be transferred with regard to the three contract claims in

excess of $10,000 pursuant to 28 U.S.C. 1631 to the United States Claims Court."

January 17, 1984, Appellant filed a "MOTION FOR RECONSIDERATION ON ORDER DIRECTING PLAINTIFF TO ELECT TO WAIVE CONTRACT DAMAGES CLAIMS ABOVE $10,000 TO BE WITHIN THE COURT'S JURISDICTION, (see DC # 45).

February 9, 1984, the Hon. James P. Churchill entered the "ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION AND GRANTING PLAINTIFF'S MOTION FOR ENLARGEMENT OF TIME", (see Appx-I).

These are the two (2) ORDERS entered by the Trial Judge, that the Appeal to the Sixth Circuit was originally based upon.

All of Appellant's Claims against HUD are based on Sex Discrimination.

If Appellant had filed her Complaint as a Direct Discrimination Claim, she would have included numerous other Claims, such as emotional Distress, punitive damages, loss of anticipatory profits, etc.

The fact that Appellant restricted her Claims only to losses incurred, due to Sex Discrimination, does not justify to limit her recovery, for the relief sought, not to exceed $10,000, with each Contract

The abuse and Sex Discrimination that the Government burdened Appellant with is not within the scope

of the Contract, it is not covered by Contract Dispute Clauses and it is not covered by CDA, it is Prohibited by Law, and, it violated Appellant's Constitutional Right.

This establishes Jurisdiction of the U. S. District Court, without limitation to amounts Claimed with each Contract.

The fact that there may not be statutes as of yet, to protect the Contractor (Appellant) against Discrimination, as indicated by the Court, T.21-23 and T.30 (1-5-84) involving Sex Discrimination by Government Contracting Authorities, can not justify to limit the possible recovery, nor does it justify to toss this Complaint around, between Federal Courts. to find one with proper Jurisdiction.

STATEMENT OF FACTS

Action No. 83-CV-0348-DT, involving seven (7) Terminated Contracts, Dismissed by the HUDBCA for Lack of Jurisdiction, was the first Complaint filed by Appellant, January 31, 1983, in the U. S. District Court. Case was assigned to the Hon. Ralph B. Guy.

May 23, 1983, Government filed "FEDERAL DEFENDANT'S MOTION TO DISMISS OR TO GRANT SUMMARY JUDGMENT" Government with its Brief in Support of said

otion, Claimed that the Court lacked subject matter jurisdiction on two (2) Contracts exceeding $10,000, ursuant to 28 U.S.C. 1346 (a)(2).

Following oral argument on June 22, 1983, and the Court considering Government's Motion, Brief and Appellant's Opposition thereto, which was totally based on Sex Discrimination, the Trial Judge entered an Order July 8, 1983, Denying Government's Motion for Summary Judgment.

Here we have two different Legal Interpretations, on same issue, from two different Trial Judges, both in the U. S. District Courts.

In the matter at issue herewith, pursuant to FRCP Rule 12.(a), Government had 60 days from February 8, 1983, to file an Answer to Appellant's Complaint.

Government failed to file an Answer and at the present it appears that Government gained immunity from having to file an Answer to Complaint.

April 20, 1983, Government filed a "MOTION FOR MORE DEFINITE STATEMENT".

Said Motion was purely based on what the Government considered to be "necessary to determine whether the jurisdictional amount limit of 28 U.S.C. 1346 (a)(2) is exceeded or not", (see DC #3, page 3)

April 26, 1983, Appellant filed her Response to Government's Motion, (see DC #4 pages 2-6).

Wigh Paragraph 9 Appellant gives a breakdown of the amounts Claimed with each Contract.

It can well be noted that the amounts Claimed with three (3) of the Contract at issue with this Complaint, are in excess of $10,000 each.

With this the Government and the Trial Judge got the information Government was seeking, subject matter jurisdiction under 28 U.S.C. 1346 (a)(2).

June 8, 1983 the Hon. James P. Churchill, entered an Order Granting Defendant's Motion for More Definite Statement and Directing the Filing of an Amended Complaint, (see DC #7).

Said Order received June 10, 1983, states:

> "IT IS FURTHER ORDERED that the plaintiff file an amended complaint which incorporates the information provided in paragraph 9-12 of her response to the defendant's motion for more definite statement, said amended complaint to be filed within twenty (20) days of the entry of this order."

June 30, 1983, Appellant filed the AMENDMENT TO COMPLAINT, (see DC #9, page 2).

In this section, "Jurisdiction of the Court", Appellant gives her theory as to why 28 U.S.C. 1346 (a)(2), is irrelevant to the Claims herewith involved.

It can well be assumed that this, and, the Order entered July 8, 1983, by the Hon. Ralph F. Guy Jr., under Case No. 83-CV-0348-DT, Denying Government's Motion for Summary Judgment, whereby, due to Sex Discrimination, lack of Jurisdiction on two (2) of the Contracts under 28 U.S.C. 1346 (a)(2) was denied, obviously was taken in consideration by the Government and the Trial Judge, at that point, involving same issue with three (3) of the Contracts herewith involved.

July 28, 1983, Appellant filed a Motion to Compel Government's Answer to Complaint and Amendment thereto, (see DC #14)

The Order for Submission and Determination of Motion without Oral Hearing, entered August 5, 1983, instructs the Government to file a Response "no later than August 15, 1983".

This allowed the Government more than six (6) months, in lieu of the sixty (60) days that pursuant to FRCP Rule 12(a), it had, to file an Answer to Complaint.

Government ignored this instructions and failed to file an Answer to Complaint.

The issues presented with Complaint and Amendment

thereto, as Ordered by the Trial Judge, certainly require an Answer, (see DC #1 & #9), but, Government successfuly continuous to avoid doing so.

Pursuant to FRCP Rule 55.(e), based on Government's failure to file an Answer, September 23, 1983, Appellant filed "PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT", (see DC #21, Br. 2-3).

In response to this, the Trial Judge entered two (2) ORDERS on November 16, 1983:"ORDER TO SHOW CAUSE" and "ORDER DENYING MOTION TO COMPEL DEFENDANT TO ANSWER AMENDED COMPLAINT AND AUTHORIZING ENTRY OF DEFAULT", (see Appx-G).

The ORDER "Authorizing Entry of Default" has a foot note which states:

> "The plaintiff's motion for default judgment will not be scheduled for hearing until after the hearing on the Court's order to show cause bearing this date".

This is truely confusing, but, by this action the Trial Judge Granted immunity to the Government, against having to file an Answer to Appellant's Complaint and Amendment thereto, which, the latter on Page 2 under "Jurisdiction of the Court", gives Appellant's reasoning as to why the Court's Jurisdiction under 28 U.S.C. 1346(a)(2), is irrelevant in this matter, (see DC #9, page 2).

Granting the Government immunity against having to Respond to Appellant's Amended Complaint, is a "Repeat Performance" of what happened, when these four (4) Contracts were on Appeal before the HUDBCA;

Appellant repeatedly filed Motion after Motion to Compel Government to file Answers to Complaints, which although pursuant to Rule 6.(b) of Rules of Procedure for Boards of Contract Appeals, the Government had only thirty (30) days to do so, for almost four (4) years was completely ignored by the Government and the Board.

This gave the Government the opportunity to file a Motion to Dismiss, August 2, 1982, this is more than three (3) years later), stating:

> "The Jurisdiction of the Board of Contract Appeals is limited to appeals from decisions of contracting officer's", (emphasis added).

At the Pre-Hearing Conference on August 13, 1982, said Motion was Granted and the Appeals on these four (4) Contracts were Dismissed by Lack of Jurisdiction.

This was neatly done: Had the Board Compelled the Government to file Answers to Appellant's Complaints, all issues, as set forth, were before the B/O, whereby Appeals could not have been Dismissed, by Lack of Jurisdiction, and;

Had the Trial Judge in the District Court Compelled the Government to follow his original instructions for the Government to file an Answer to the Complaint and Amendment thereto, it is well indicated, that he would not have been able to Rule, that, Appellant's Claims against HUD, are Claims under 28 U.S.C. 1346 (a)(2).

In addition, with the present Trial Judge's unfinished "Authorizing Entry of Default", Government was also Granted immunity from having to cooperate with Discovery.

December 5, 1983, Appellant filed Interrogatories directed to Don Snyder, C/O involved with these four (4) Contracts, which as of this date, remains pending, (see DC #27).

If nothing more, this was an unjustified but neat means to Grant the Government immunity and to continue causing a delay for the relief sought, herewith.

The Order to Show Cause, entered November 16, 1983 (Appx-M) was also an unjustified but neat means to Grant the Government a second bite of the same apple.

Involving the Court's Jurisdiction under 28 U.S.C.

(a)(2), Government had the information it was
ing with "PLAINTIFF'S RESPONSE AND BRIEF TO
RNMENT'S MOTION FOR MORE DEFINITE STATEMENT"
age 2, since April 26, 1983, (see DC #4).

This was more than sufficient time for the Go-
ment to have filed same Motion to Dismiss, as it
with Action No. 83-CV-0348-DT, which, based on
Discrimination, was Denied by the Hon. Ralph B.
Jr., if the Government had considered that
sion erroneous.

To Grant the Government a second opportunity at
more than seven (7) months later, was unjustified.

Appellant's Brief, Subject Matter Jurisdiction,
d December 5, 1983 (see DC #29 pages 1-13) goes
further detail of the abuse and Sex Discrimina-
that Appellant was burdened with by the Govern-
, to which the Court's Jurisdiction under 28 U.
1346(a)(2), becomes completely irrelevant to
Complaint.

Government filed its Brief concerning subject
er jurisdiction December 7, 1983, Claiming immu-
under 28 U.S.C. 1346 (a)(2), and citing nume-
Decisions entered by the Higher Courts, but,
of them involve Discrimination.

To outline to the Court as to how each Item as Claimed by Appellant, involved Discrimination, a Reply Brief was filed December 27, 1983, (see DC #38)

With the ORDER appealed from, entered January 9, 1984, (see DC #43), the Court states:

> "and the Court having found that the claims are not governmed by the Contract Disputes Act of 1978 since it does not appear that the plaintiff made an election to proceed under the Act;" (emphasis added).

For this reason, it can well be assumed that this matter will be Dismissed in the U. S. Claims Court.

The new issue raised by the Trial Judge, at the Hearing, as to whether the Prime Contractor (Appellant) can Claim damages involving Discrimination pertaining to Government Construction Contracts, at such short Notice, Appellant was unable to Defend and/or prove that Discrimination is Prohibited by Law, and, that to be treated as equal, is Appellant's Constitutional Right, that not even the Government has the Right to violate.

To defend this issue, Appellant filed a Motion for Reconsideration on January 17, 1984, (see DC #45).

Said Motion was Denied, February 9, 1984, (see Appx-I), whereby the Court states:

"and it appearing that the authorities cited by

the plaintiff in her brief in support of the motion for reconsideration prohibit discrimination by federal government contractors on the basis of sex and do not proscribe such discrimination by the federal contracting authorities against contractors;"

This gave Appellant little choice, if any;

The consent to Waive amounts in excess of $10,000 on two (2) of the three (3) Contracts involved, was obtained through coercion and duress.

February 15, 1984, Appellant filed the Amendment to Complaint, as Ordered by the Trial Judge, (see DC #49).

For the third Contract, same day, which is also the day the Notice of Appeal was filed, Appellant filed "MOTION TO SET ASIDE TEMPORARILY CLAIMS REGARDING CONTRACT 044-78-4679 (LAKEWOOD), (see DC #50).

The total amount Claimed with the Lakewood Contract, all of which is based on Sex Discrimination, comes to $25,108.61, less the $100 charged for two (2) Inspection Fees, refunded with Interest to Appellant, by ORDER from the HUDBCA.

For Appellant to waive the amount in excess of 10,000, with this Contract, presents a considerable, unjustified loss.

Pursuant to DC Local Rule 17 g., a respondent has ten (10) days after service of a Motion to file

an opposing Response including a Brief and supporting Documents, if such are available.

Government has in the passed repeatedly claimed that it has thirty (30) days to file a Response in opposition to a Motion.

But, when thirty (30) days pass and Government fails to file a Response in Opposition of a Motion, to keep both parties on equal grounds, it is Appellant's contention that it must be assumed that the Government is not opposing the Motion, said Motion should be Granted and a Reminder to the Government is completely out of line.

Contrary to this, April 11, 1984, this is almost two (2) months from the date of service of said Motion, the Hon. James P. Churchill entered an"ORDER FOR SUBMISSION AND DETERMINATION OF MOTION WITHOUT ORAL HEARING" (see DC #58), whereby it states:

> "A response, including a written brief, may be filed no later than April 17, 1984."

April 18, 1984, the Hon. James P. Churchill entered an ORDER for enlargement of time: "ENLARGED to April 24, 1984".

With this, again, the Court is without just cause granting the Government a bite on the apple, that it voluntarily relinquished and waived with its failure

to file an opposing response to Appellant's Motion, within proper time limit.

April 20, 1984, Appellant was served "FEDERAL DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO SET ASIDE TEMPORARILY CLAIMS REGARDING CONTRACT 044-78-4679 (LAKEWOOD) whereby it states:

> "Therefore, pursuant to the Order dated January 6, 1984, the cause of action regarding Contract 044-78-4679 (Lakewood) should be immediately transferred to the Claims Court pursuant to 28 U.S.C. 1631."

April 26, 1984, Appellant filed a Reply with Brief in Support thereof and Exhibit attached thereto, (see DC #61).

ORDER TO TRANSFER LAKEWOOD CONTRACT TO THE UNITED STATES CLAIMS COURT

If the Trial Judge is correct with his Decision that the Law does not prohibit Sex Discrimination by federal contracting authorities against contractors it can serve no purpose to Transfer this matter, totally based on Sex Discrimination, to the Claims Court, whose Jurisdiction is the same as the District Court.

For the relief sought by Appellant, concerning this issue, it is clearly indicated that the Supreme Court of the United States, is the only Court that has the Power and Jurisdiction, to Grant such relief.

Based on the fact that the Court was not acting

its Order Denying Motion to Compel Defendant to Answer Amended Complaint and Authorizing Entry of Default, (see Appx-G) and was not acting on Claims with the three (3) remaining Contracts, two (2) of which under duress Appellant waived amounts in access of $10,000 each, as Ordered by the Court, it appeared that effectively, the Court had stayed proceedings during pendency of the Appeal, but, like an afterthought;

September 14, 1984, this is approximately seven (7) months from the date that Appellant filed her original Motion to Set Aside Temporarily Claims Regarding the Lakewood Contract, the Court entered the "ORDER DENYING PLAINTIFF'S MOTIONS TO TEMPORARILY SET ASIDE CLAIMS REGARDING LAKEWOOD CONTRACT AND MOTION TO AMEND ORDER SUBJECT MATTER JURISDICTION AND TRANSFERRING ACTION WITH REGARD TO LAKEWOOD CONTRACT TO UNITED STATES CLAIMS COURT", (see Appx-C)

Thereby, if Appellant would have accepted and continued with the Transfer to the Claims Court, the Appeal would become Moot.

This was neat but clearly unjustified.

Said Order was served upon Appellant by Mail, September 18, 1984.

Pursuant to FRCP Rule 62.(a):

"no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry".

Pursuant to FRCP Rule 6.(e):

"Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period".

Said Order indicates that it was entered September 7, 1984.

Said Order further indicates that a copy of same was mailed to Plaintiff, September 14, 1984.

Accordingly, this did not allow sufficient time for Plaintiff to have filed a Motion for Reconsideration on Said Order, within the 10 days allowable.

October 1, 1984, Appellant filed Motion to Stay Proceedings for Enforcing Order to Transfer Action to the United States Claims Court, (see DC #67).

October 7, 1984, the Court entered the ORDER DENYING PLAINTIFF'S MOTION TO STAY PROCEEDINGS FOR ENFORCING ORDER TO TRANSFER ACTION TO UNITED STATES CLAIMS COURT, (see Appx-D).

With said Order the Court States:

"Plaintiff having filed a motion to stay proceedings for enforcing order to transfer action to

the United States Claims Court; and the Court having construed the motion as a motion for reconsideration of the Court's Order Denying Plaintiff's Motions to Temporarily Set Aside Claims Regarding Lakewood Contract and Motion to Amend Order Subject Matter Jurisdiction and Transferring Action with Regard to Lakewood Contract to United States Claims Court dated September 7, 1984" (emphasis added).

Thereby the Court erroneously:

"determined that plaintiff's motion is untimely".

For all the years that Appellant has been in Litigation with the Government, to meet proper time limit, has been a constant problem, they do not mail papers within sufficient time, for Appellant to Respond during the period prescribed with Court Rules;

This is a perfect example:

(a) The Court is basing said Order on the date it was entered, September 7, 1984.

(b) Next, it overlooks the fact that said Order clearly indicates to have been mailed September 14, 1984, (7 days later).

(c) Allowing the 3 days for mailing provided with FRCP Rule 6.(e), the 10 days allowable for Appellant to have filed a Motion for Reconsideration, were lost right there, but;

(d) This did not stop the Court from construing Appellant's Motion to Stay Proceedings, to be a Motion for Reconsideration, which provided grounds for denying said Motion for being untimely;

(e) Thereby, Claims regarding Contract 044-78-4679 (Lakewood) was unjustly, during pendency of the Appeal, transferred to the U. S. Claims Court, where it got Dismissed.

This is truely hitting Appellant with both ends of the stick.

At that point, it appeared that Appealing for relief to the Sixth Circuit, was the only Recourse available.

October 16, 1984, Appellant filed in the District Court, the Notice of Appeal from the Order Denying Plaintiff's Motion to Stay Proceedings for enforcing Order to Transfer Action to United States Claims Court, entered the 21st day of October, 1984 and Docketed on the 9th day of October, 1984, (for this mix-up in dates, see Appx-I & Appx-D, also see DC #68).

By letter dated October 19, 1984, clerk of the Sixth Circuit, advised that this Appeal was Docketed under Case No. 84-1748. It was not consolidated with the existing Appeal under same DC No. 83-0454.

October 24, 1984, Appellant also filed in the Sixth Circuit Motion to Stay Order by District Court Pending Appeal.

Pursuant to FRAP Rule 8.(a) a Motion for Stay can be taken to a Court of Appeals during pendency of an Appeal, and, Appellant followed all the provisions as set forth with this Paragraph.

All these was completely ignored by the Sixth Circuit and November 16, 1984, this is twenty three (23) days later, the Court transferred the Appeals to the U. S. Court of Appeals for the Feceral Circuit.

This certainly was not in the interest of Justice.

PROCEEDINGS IN THE
UNITED STATES CLAIMS COURT

With all the efforts made by Appellant, as indicated herewith, to stop Claims for the Lakewood Contract, from being transferred to the Claims Court, during pendency of the Appeal, she could not beat the Federal system, and, nobody even considered the cost to the Government from bringing the Record file, back from the Sixth Circuit, making an additional copy of the complete Record, return same to the Sixth Circuit and send a copy of the Record to the Claims Court.

All of these could very well be a waste of Government money:

(a) Hopefully, assuming that this Honorable Court will agree with Appellant, that her Claims against HUD, based on Sex Discrimination, are not Claims under 28 U.S.C. 1346, thereby said Claims will be reinstated and possibly added back to the original Complaint, in the District Court.

(b) Should this Honorable Court rule against Appellant on this issue, based on the fact that it is essential to keep Claims for all four (4) Contracts together, they are dependent upon

each other, to prove bad faith and Sex Discrimination, Appellant may have to waive amounts in excess of $10,000, to be under the Jurisdiction of the District Court.

The Notice from Frank T. Peartree, Clerk in the . S. Claims Court is dated November 2, 1984.

With said Notice, Appellant was informed that n that day, they filed that cause under No. 568-84 C, ransferred from the U. S. District Court for the astern District of Michigan, "consisting of three ound volumes", (emphasis added)

Appellant's Motion to Stay Proceedings Pending ppeal was received by the Claims Court, November 3, 1984.

December 11, 1984, the Court entered an ORDER ranting Appellant until December 26, 1984, (a total f 15 days) "to file a complaint pursuant to RUSCC 4(a)(2)", or it will be Dismissed (see Appx-E).

This was a neat way for Denying Appellant's otion, had Appellant complied with that Order and ontinued with this matter in the Claims Court, her ppeal would become Moot.

This was the general idea.

Subsequently, December 27, 1984, the Judgment as entered Dismissing the action without prejudice owever;

Thereby, the Government can no longer Claim that the Appeal from the Decisions entered in the District Court are from Interlocutory Orders, it is now a Final Judgment, (see Appx-F).

PROCEEDINGS IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Again, pursuant to FRCP Rule 62.(a):

"no execution shall issue upon a Judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry"

But, this is of no benefit for Appellant.

The Order to Transfer the Appeal to the Federal Circuit, was entered in the Sixth Circuit, November 16, 1984, (see Appx-A).

Said Order was served upon Appellant by mail, November 20, 1984.

Letter signed by George E. Hutchinson, Clerk in the Court of Appeals for the Federal Circuit, dated November 20, 1984, informs Appellant that the Appeal Transferred from the Sixth Circuit, was Docketed under Case No. 85-793.

This is only four (4) days from the entry of the of the Order and contrary to FRCP Rule 62.(a).

Obviously provisions set forth with Federal Rules of Civil Procedure, are of no benefit

r Appellant, if even Federal Appellate Courts are mune to such provisions.

Appellant's Motion for Reconsideration of Order o Transfer Appeal to the United States Court of Appeals for the Federal Circuit, was sent by certified il November 26, 1984 and received in the Sixth Circuit, November 28, 1984.

The letter by Clerk Hutchinson well supports hat by the time said Motion, filed within proper me limit, was received in the Sixth Circuit, the peal file, contrary to Court Procedure, was already the Federal Circuit, but:

The Order Denying Appellant's Motion for Reconideration states:

> "This panel after having carefully re-examined the record, finds that it misapprehended no question of law or fact in its November 16, 1984 order", (see Appx-B), (emphasis added).

Based on the following, it can well be assumed hat the Appeal File Record, was never returned to he Sixth Circuit, for this purpose:

November 26, 1984, same day that Appellant filed otion for Reconsideration in the Sixth Circuit, she lso filed in the Federal Circuit, a Motion to Stay roceedings.

With Memorandum in Support of Motion to Stay,

Appellant states:

"WHEREFORE, Appellant prays that based on the issues set forth with said Motions, this Honorable Court will Stay Proceedings in this matter, pending a Ruling in the Sixth Circuit Court of Appeals on her Motions for Reconsideration, whereby, it can be determined whether an Appeal to the Supreme Court of the United States is indicated, in order to pursue this matter further."

December 4, 1984, Government filed "Appellee's Response to Appellant's Motion to Stay Proceedings", whereby it states:

"We do not oppose appellant's motion for an order staying proceedings in this Court pending a final decision on appellant's attempt to seek review of the order entered November 16, 1984, by the United States Court of Appeals for the Sixth Circuit transferring this appeal to this Court. We suggest, however, that if the Court allows the motion, it limit the duration of the stay and order appellant to keep the Court advised of any significant actions with respect to her attempt to overturn the transfer of her appeal to this Court."

By letter dated December 10, 1984, signed by Clerk Hutchinson, Appellant was advised that the Stay of Proceedings will be up to and including, January 24, 1985.

With said letter, Clerk Hurchinson states:

"Appellant is requested to advise the Court as promptly as possible after the Sixth Circuit has rendered its decision on the reconsideration motions.:

January 2, 1985, by Certified Mail, copy of the

Notice of Appeal to the Supreme Court, from the ORDER entered in the Sixth Circuit, was sent to the Federal Circuit.

Same was received in the Federal Circuit, January 7, 1985.

By all indications the fact that there is an Appeal to the Supreme Court pending, did not effectively Stay Proceedings in the Federal Circuit.

By letter dated January 24, 1985, Clerk Hutchinson states:

> "As to appeal 85-793, the stay of proceedings has expired as of this date. By letter of January 23, 1985, the appellee has advised the Court that motions to dismiss both this appeal and the second appeal will be filed by February 11, 1985. Accordingly, a specific briefing schedule will be deferred for both cases until these motions are disposed of by the Court."

Appellant's Motion for Continuance of Stay of Proceedings Pending Appeal to the Supreme Court of the United States, mailed February 4, 1985, was received in the Federal Circuit February 6, 1985.

Presently a Decision in the Federal Circuit on said Motion, remains pending.

Based on previous experience in the Federal Circuit, it can well be assumed that if the Court will deny said Motion, the Government will succeed in

having the Appeal Dismissed and.or cause same to become Moot.

JURISDICTION

The major issue that was before the Sixth Circuit on Appeal, was from the Orders entered in the District Court, having determined that the law does not prohibit Sex Discrimination by the Federal Authorities against Federal Government Contractors, thereby, said Claims against the United States Department of Housing and Urban Development, are Claims against the United States under 28 U.S.C. 1346 (a)(2).

Now the Sixth Circuit, without entering an opinion and without an audio recording that could be reviewed, determined that the District Court action was based in part on 28 U.S.C. 1346.

These are issues of Law that only the Supreme Court of the United States, has the power and jurisdiction to Grant Appellant the relief sought with the Appeal, which involves Claims that Appellant has been on route for almost six (6) years, and, which is being tossed around between Federal Courts, who for one reason or another find grounds to free themselves, by claiming lack of Jurisdiction.

These are grounds on which the Jurisdiction of the Supreme Court of the United States is invoked.

(i) STATUTORY BASIS FOR FEDERAL JURISDICTION

All Claims against the U. S. Department of Housing and Urban Development, are based on the abuse and Sex Discrimination that Appellant was burdened with.

This is a violation of Appellant's Constitutional Right, which provides that all people are to be treated as equal.

28 U.S.C. 1331, provides that the U. S. District Courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. 1343(a)(4), provides that the U. S. District Courts shall have original jurisdiction of any civil action, to recover damages or to secure equitable or other relief, under any Act of Congress providing for the protection of Civil Rights.

(ii) ENTRY OF ORDERS SOUGHT TO BE REVIEWED

ORDER entered in the Court of Appeals for the Sixth Circuit, on the 16th day of November, 1984, whereby the Court determined that the District Court

action is based in part on 28 U.S.C. 1346 and thereby Ordered the Appeals to be Transferred to the Court of Appeals for the Federal Circuit, (see Appx-A)

ORDER entered in the Court of Appeals for the Sixth Circuit on the 21st day of December, 1984, Denying Appellant's Motion for Reconsideration, (see Appx-B).

Notice of Appeal to the Supreme Court is stamped received in the Sixth Circuit, January 4, 1985, same was returned by Clerk Hehman, informing that Appellant erred by sending said Notice to their Court, (see Notice of Appeal, Appx-J).

Same Notice of Appeal was also sent to the Supreme Court, the 2nd day of January, 1985.

ORDER Concerning Order to Show Cause and Directing Plaintiff to Elect Whether to Waive Contract Damage claims above $10,000 on the three Contracts Otherwise Outside the Court's Jurisdiction on or Before February 1, 1984, entered in the U. S. District Court Eastern District of Michigan Southern Division, whereby the Trial Judge determined that Appellant's Claims against HUD are Claims against the U. S. under 28 U.S.C. 1346 (a)(2), (see Appx-H).

ORDER Denying Plaintiff's Motion for Reconsideration, entered in the District Court, on the 9th day of February, 1984, whereby the Court determined that the law prohibits "discrimination by federal Government Contractors on the basis of sex and does not proscribe such discrimination by federal contracting authorities against contractors", (see Appx-I).

Notice of Appeal was filed in the District Court on the 15th day of February, 1984, (see Appx-K).

With said Notice there is a typographical error, whereby it indicates that Appeal is taken to the Court of Appeals for the Federal Circuit.

This error was corrected by the Clark and said Notice, including all Documents thereafter, were submitted to the Court of Appeals for the Sixth Circuit.

ORDER Denying Plaintiff's Motion to Stay Proceedings for enforcing Order to Transfer Action to U. S. Claims Court, entered in the District Court, on the 21st day of October 1984, served upon Appellant by Mail, October 11, 1984, whereby the Court construed the Motion to Stay, as a Motion for Reconsideration, thereby, establishing grounds to determine that Motion is Denied on the basis of being untimely, (see Appx-D).

Notice of Appeal was filed in the District Court on the 16th day of October, 1984, (see Appx-I).

JUDGMENT entered in the U. S. Claims Court on the 27th day of December 1984, whereby Appellant's Motion to Stay Proceedings Pending Appeal was Denied and thereby Complaint was Dismissed without prejudice. (see Appx-F)

Although reference to this Judgment is made with this Jurisdictional Statement, an official Notice of Appeal was not filed.

(iii) STATUTORY PROVISIONS

28 U.S.C. 1252, provides that a party may Appeal to the Supreme Court of the United States, from an Interlocutory of final Judgment, decree or Order of any Court of the United States in any civil action to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

28 U.S.C. 2072, provides that the Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions.

28 U.S.C. 2076, provides that the Supreme Court of the United States shall have the power to prescribe amendments to the Federal Rules of Evidence.

28 U.S.C. 2106, provides that the Supreme Court may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully braught before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. 2103, provides that if an appeal to the Supreme Court is improvidently taken from a U. S. Court of Appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken.

CONSTITUTIONAL PROVISIONS INVOLVED

DISCRIMINATION IS PROHIBITED BY LAW.

Discrimination is prohibited by the Civil Rights Act of 1964 and by Executive Order Number 11246.

Title VII of the Civil Rights Act of 1964,

administered by the Equal Employment Opportunity Commission, prohibits Discrimination because of Race, Color, Religion, Sex or National Origin.

Executive Order Number 11246, administered by the Office of Federal Contract Compliance, prohibits Discrimination, because of Race, Color, Religion, Sex or National Origin.

Title VI of the Civil Rights Act of 1964, P.L. 88-352 and the United States Department of Justice Regulations, 28 CFR Part 42, prohibits Discrimination because of Race Color, Religion, Sex or National Origin.

The Fair Labor Standards Act of 1938, as amended, prohibits Discrimination on the basis of Sex.

CFR 1-12.801(b) provides that:

> "The regulations of the Secretary of Labor apply to all contracting agencies of the Government and to contractors and subcontractors who perform under Government Contracts", (emphasis added).

Provisions set forth with the Equal Employment Opportunity, the Executive Order No. 11246 of September 24, 1965 and the rules and regulations of the Secretary of Labor shall be employed by agencies with respect to Government Contracts and subcontracts.

With respect to Government Contracts and/or

Government funded Contracts, the Law requires that Bidders shall be informed of his (her) Rights against Discrimination.

This the U.S. Department of Housing and Urban Development, fails to do, with every Contract put out for Bidding.

STATEMENT OF THE CASE

A copy of the Notice of Appeal from the Orders entered in the District Court, was served upon Francis L. Zebot, Assistant United States Attorney, original Counsel for the Government, February 15, 1984.

Government's Notice of Change of Counsel, was served upon Appellant by Mail, May 31, 1984.

Same day Appellant was also served Appellee's Motion to Dismiss the Appeal for lack of jurisdiction, claiming that the Appeal is from an interlocutory Order.

This was erroneous to begin with, for various reasons.

Even if the Orders Appealed from could be considered Interlocutory, which they are not, pursuant to 28 U.S.C. 1292 the Courts of Appeals shall have jurisdiction of Appeals from Interlocutory Orders of the District Courts of the United States.

Next, Jurisdiction shall be taken care of at the very beginning, certainly not beyond the 60 days that the Government is Granted, to Respond.

Government waited until May 31, 1984, this is 3 months and 16 days, to serve Appellant the Motion to Dismiss, fully aware that pursuant to instructions from Clerk for the Sixth Circuit, dated April 23, 1984, Brief of the Appellant was due not later than June 2, 1984.

This may not be contrary to Law, but, considering the cost, work and time consuming to Appellant, involved with said Brief, it clearly supports the lack of consideration by the Government, in order to be as burdensome and costly, as possible.

Based on the fact that Government filed its Motion to Dismiss beyond the 60 days it had to Respond, it is Appellant's contention that said Motion shall be Denied, for being untimely.

To further prove the unfairness in Federal Courts, involving Appellant's Litigation with the Government:

By letter dated May 29, 1984, the Sixth Circuit Clerk, fully aware that the Brief of the Appellant was due no later than four (4) days thereafter, informed Appellant that the briefing schedule "will be

held in abeyance pending the disposition of Appellee's Motion to Dismiss for lack of jurisdiction."

This was for the benefit of the Government, certainly to late for Appellant to benefit.

Appellant did attempt in the District Court to have the Order Appealed from Amended, and, the Sixth Circuit did allow suffieient time for this purpose, however Appellant's Motion to Amend was Denied in the District Court, (see Appx-C), but;

The fact that the Trial Judge, September 7, 1984, ORDERED Contract 044-78-4679 (Lakewood), to be transferred to the Claims Court, an issue under Appeal, and, in the Claims Court the Complaint was Dismissed without prejudice, well supports that the Order Appealed from, is a Final Judgment, it is not Interlocutory and never was.

Appellant's Response to Appellee's Motion to Dismiss was mailed October 1, 1984 and received in the Sixth Circuit October 4, 1984.

This does not stop the Government from causing an additional delay for the relief sought by Appellant;

By letter dated January 23, 1985, written by George M. Beasley, III, from the U. S. Department of Justice, present Government Counsel, addressed to

Mr. Hutchinson, Clerk for the CAFC, he advised that the Government intends to file Motion to DismissAppeal as Interlocutory.

Appellant fails to see justice, to be burdend again, with the cost, time consuming and work involved, for the same issue, the second time around.

As previously presented herewith, by Order from the Trial Judge, entered October 7, 1984, he Denied Appellant's Motion to Stay Proceedings for enforcing Order to Transfer Action to the U. S. Claims Court, (see Appx-D).

October 16, 1984, Appellant filed in the Distrct Court a Notice of Appeal to the Sixth Circuit, from said Order, and, to insure that the Appellate Court, will give consideration to this pressing, time limited matter, Appellant also filed in the Sixth Circuit, October 24, 1984, Motion to Stay Order by District Court Fending Appeal.

It took the Sixth Circuit until November 16, 1984, a total of twenty three (23) days to enter its Order to Transfer the Action to the Federal Circuit, thereby, completely ignoring Appellant's Motion, fully aware that same was presssing and under time limit.

REASON FOR APPEAL

Appellant with her Pre-Argument Statement filed in the Sixth Circuit, clearly sets forth that Claims are totally based on the abuse and Sex Discrimination that she was burdened with, by the U. S. Department of Housing and Urban Development, during the performance of the Contracts at issue herewith, which was a continuation of the Discrimination that she was burdened with, all through the years that she partipated with HUD Programs.

Appellant was the first Female General Contractor, approved early in 1972, to participate with all Programs at HUD, and, continued to be the only Female General Contractor on their Programs, up to and including 1979.

Claims involving Discrimination are not within the scope of the Contract, they are not subjec to Contract Dispute Clauses, they are not government by CDA and are completely irrelevant to the provisions set forth with Jurisdiction under 28 U.S.C. 1346(a)(2).

Appellant argues that the Court erred with its ORDER to waive any sums in excess of $10,000 with each Contract, to be within the Jurisdiction of the Court, under 28 U.S.C. 1346(a)(2), or such Claims

will be transferred to the U. S. Claims Court, pursuant to 28 U.S.C. 1631.

Appellant further argues that her Claims, based on Discrimination, are within the Jurisdiction of the U. S. District Court, without limitation as to the amounts Claimed.

Appellant further argues that the Court erred with its Decision that the Law prohibits "discrimination by federal government contractors on the basis of sex and do not proscribe such discrimination by the federal contracting authorities against contractors".

This is completely out of line.

All people are to be treated as equal.

During the performance of the Contracts at issue herewith, Appellant provided Income for a considerable group of men.

Appellant argues that she is entitled to the same protection against abuse and sex discrimination as the men, that, by her efforts, were provided with that Income.

There was no just cause to transfer the Lakewood Contract to the Claims Court, which could very well be Dismissed there, by lack of Jurisdiction, involving CDA.

Government Rules are that 5% of Government and/or Government funded Construction Contracts shall be awarded to Female owned Companies.

Appellant argues that it shall not be for the purpose to keep Government employees amused, nor shall it be to get the work needed, performed below cost.

The Brief of the Appellant, pages 22-31 and Exhibits included therewith, also clearly supported that Appellant was a victim of Sex Discrimination.

All these was completely ignored by the Sixth Circuit and to free itself from this Appeal, by lack of Jurisdiction, erroneously decided that the District Court action was based in part on 28 U.S.C. 1346 which is totally irrelevant to Claims based on Sex Discrimination, and thereby, the Court established grounds to transfer this Appeal to the Federal Circuit, but;

The Court did not enter an Opinion, nor was there an Audio Recording made, that would support the Court's Decision, thereby, there is nothing on Record for this Honorable Court to Review, for this Appeal to be presented by Petitioning the Court for a Writ of Certiorari.

The Order entered in the District Court indicating

that Appellant's Claims against HUD are Claims against the U. S. under 28 U.S.C. 1346, is a major issue braught on Appeal

By the Sixth Circuit, with its ORDER indicating that the District Court action was based in part on 28 U.S.C. 1346, used as grounds to transfer the Appeal to the Federal Circuit, the Court is:

(a) Deciding the Appeal through the back door.

(b) Providing grounds for the Federal Circuit, to Dismiss the Appeal, on the basis that it already has been decided in another Appeal Court.

(c) One Federal Appeal Court is not about to overturn a Decision entered in another Federal Appeal Court, also;

(d) Thereby, grounds are established for the Claims Court, to have exclusive jurisdiction on this matter.

(e) The U. S. Claims Court is not a Court for Trying Discrimination Cases.

During the performance of the Contracts at issue herewith, Appellant followed the Contracting Officer's instructions and continued with performance to completion, pending an Appeal thereafter.

There is no just cause for these Claims, based on Sex Discrimination, to be tossed around between Federal Courts for almost six (6) years, nor does it justify to limit Appellant's possible recovery.

To use as an example, as previously presented

herewith:

(a) There was no Dispute as to whether the exterior door for the Garage on the Lakewood property, was necessary, nor was there a Dispute as to whether the replacement of the City Sidewalk was necessary.

(b) The Dispute was over the fact that HUD refused to allow on the Amendment, on these standard Items, same amounts per Item, and/or sq. ft., as allowed for a Male Contractor.

(c) This is Denying Appellant equal pay for equal worth, same as for a Male Contractor.

(d) This is a Violation of Appellant's Constitutional Right, which is completely irrelevant to 28 U.S.C. 1346, thereby;

(e) The amount Claimed shall not be limited to $10,000, in order to be under the Jurisdiction of the District Court, that has original jurisdiction on matters of this nature.

Assuming that the Trial Judge in the District Court was correct with his Decision, that, presently there is no Law that prohibits Discrimination on the basis of Sex, by federal contracting authorities, against federal Government Contractors, then for certain, the Supreme Court of the United States, is the only Court that has the power and the jurisdiction, to Grant Appellant the relief sought with this issue.

GOVERNMENT"S USE OF THE DEPARTMENT OF JUSTICE FOR ITS DEFENSE

The United States Department of Justice

Regulations 28 C.F.P. Part 42 issued pursuant to Title VI of the Civil Rights Act of 1964, P. L. 88-352, is a protection for the Public, it Prohibits Discrimination and is there to insure that all people shall be treated as equal.

But, when the United States Government is accused of Discrimination, same United States Department of Justice Defends the Government.

This is like saying:

"Do what I tell you, but don't do what I do"

For the two (2) Cases that Appellant had in the U. S. Claims Court, the U. S. Department of Justice assigned George M. Beasley III, to be Government Counsel, and, for this matter, in the Sixth Circuit, the U. S. Department of Justice, also assigned same George M. Beasley III, to be Government Counsel.

In addition, the matter in the Federal Circuit, presently on Appeal in the Supreme Court of the U.S., also, the Department of Justice assigned same George M. Beasley, III to be Government Counsel.

It makes common sense for the U. S. Department of Justice to have a Commercial Litigation Branch to protect the Government and the General Public, but, for the same U. S. Department of Justice to defend

the Government against the very same prohibited Law, that it is supposed to protect the Public against, certainly is unjustified, does not make sense and is a poor system of Justice.

In the interest of Justice, it is Appellant's contention, that this can not be done:

(a) The U. S. Department of Justice can not properly weigh Justice, if on one hand it is to protect Appellant against Discrimination, and, on the other hand, at the same time, in the same matter, it is protecting the Government against accusation and Claims involving same Discrimination.

(b) The U. S. Appellate Courts can not properly weigh Justice, if on one hand they shall abide by rules of the U. S. Department of Justice, with provisions set up to protect the public, (Appellant) and, on the other hand they have before them, same U. S. Department of Justice, on the Defense side, for the Government.

Some where along the line, "sovereign immunity" must end some place, or else, involving Appellant's Claims against the Government including Discrimination, Federal Courts are turning back the clock, in order to Grant HUD "sovereign immunity".

Appellant argues that, some where along the line. she is also entitled to protection by the U. S. Department of Justice, to insure that her Constitutional Rights are not Violated, even by the Government.

RESOLUTION

WHEREFORE, Appellant prays that for all the reasons set for herewith, including the Brief of the Appellant with Exhibits in support thereof, filed in the U. S. Court of Appeals for the Sixth Circuit, the Supreme Court of the United States, will accept this Appeal as a Direct Appeal, and, (1) Determine the issues presented with the Brief, (2) Determine the issues presented herewith, (3) Reverse the Decision by the Trial Judge and enter an ORDER in her favor, for Claims in excess of $10,000 involving the Lakewood Contract, shall not be waived to be within the Jurisdiction of the U. S. District Court, (4) Amounts in excess of $10,000 for Contracts Longacre and Sussex, waived under duress, should be nulled and voided, (5) Reverse the spontaneous Decision in the Sixth Circuit, clearly entered for the purpose to establish grounds for transfer of this Appeal to the Federal Circuit, (6) Rule in her favor supporting that her Claims against the Department of Housing and Urban Development, based on the abuse and Sex Discrimination that Appellant was so unjustly burdened with, are not Claims against the United States under 28 U.S.C. 1346, (7) ORDER Claims with the Lakewood

Contract, that was Dismissed in the U. S. Claims Court, without prejudice, to be reinstated and transferred to its original position in the District Court and/or (8) Grant such relief as is necessary, in good conscience.

Respectfully submitted,

By: Pauline Walber D/B/A
Walber Construction Co
Appellant,
3530 West Outer Drive
Detroit, Michigan 48221
Phone: 313-864-6076 or
313-537-7800

Dated: _____

Case No._____

IN THE
SUPREME COURT OF THE UNITED STATES

CASC Nos. 84-1113 & 84-1748
DC No. 83-0454

WALBER CONSTRUCTION CO.,
Appellant,
V.
THE UNITED STATES COURT OF APPEAIS FOR THE SIXTH CIRCUIT,
Appellee.

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of March, 1985, served a true and correct copy of the JURISDICTIONAL STATEMENT and Appendix for Appellant, on the U. S. Court of Appeals for the Sixth Circuit, by enclosing same in a sealed envelope with postage prepaid for First Class Mail, addressed to: 502 U. S. Post Office and Courthouse Building, Cincinnati, Ohio 45202.

Subscribed and sworn to before me on this 8th day of March 1985.

Aleen Tutt

ALEEN TUTT
Notary Public, [illegible] MI
My Commission Ex[illegible]

By: Pauline Walber D/B/A
Walber Construction Co.
Appellant,
3530 West Outer Drive
Detroit, Michigan 48221
Phone: 313-864-6076 or
313-537-7800

Case No._____

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WALBER CONSTRUCTION CO.,
Appellant,
V.
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT,
Appellee.

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of March, 1985, served a true and correct copy of the JURISDICTIONAL STATEMENT and Appendix for Appellant, on George M. Beasley, III, Government Counsel, by enclosing same in a sealed envelope with postage prepaid for First Class Mail, addressed to: Commercial Litigation Branch, Civil Division, U. S. Department of Justice, Washington, D.C. 20530.

Subscribed and sworn to before me on this 8th day of March 1985.

Aileen Tutt

AILEEN TUTT
Notary Public, [illegible] MI
My Commission Expires Apr 12, 1985

Pauline Walber

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